Filed 5/12/10 In re K.B. CA1/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re K.B., a Person Coming Under the Juvenile Court Law.	
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. NICOLE B., Defendant and Appellant.	A126034 (Alameda County Super. Ct. No. 0J09011901)

Nicole B. (Mother) appeals the juvenile court's orders denying her petition pursuant to Welfare and Institutions Code section 388[1] and terminating her parental rights. Mother contends the court violated her statutory and constitutional rights by denying her section 388 petition without a hearing. We conclude that Mother's allegations in support of her section 388 petition were insufficient to warrant a hearing, and affirm.

BACKGROUND

I. *Detention/Jurisdiction*

K.B. tested positive for cocaine at birth and was placed in foster care on February 18, 2009, when he was 10 days old. Mother also tested positive for cocaine and admitted that she used cocaine, marijuana, cigarettes and alcohol during her pregnancy. She

[1] All further statutory references are to the Welfare and Institutions Code.

received no prenatal care and used cocaine the day before K.B. was born. Mother's prior experience with the juvenile dependency system resulted in the termination of her parental rights to her two older children for drug-related reasons. K.B.'s father is unknown.

The Alameda County Social Services Agency (the Agency) filed a dependency petition on February 19, 2009, based on K.B.'s positive toxicity for cocaine, Mother's use of cocaine and marijuana during her pregnancy, her self report of cocaine use the day before K.B.'s birth, her failure to obtain prenatal care, and the termination of her parental rights to K.B.'s older siblings. Mother submitted to the allegations at the combined jurisdiction/disposition hearing on April 15, 2009. K.B. was found to be a dependent child, removed from Mother's custody, and placed in foster care with L.V. who is also the adoptive mother of K.B.'s older brother. The court denied reunification services based on clear and convincing evidence that Mother's parental rights had been terminated as to K.B.'s siblings and she had not made a reasonable effort since then to treat the problems that led to their removal. The court ordered a permanent plan of adoption by L.V. and set a permanent plan hearing pursuant to section 366.26 for August 3, 2009.

The Agency's report for the permanent plan hearing said Mother was with K.B. at the foster home on February 11, 2009, but did not visit him after that until April 24, 2009. Mother's whereabouts were unknown from March 9, 2009, until April 2, 2009, when she called her social worker and explained she had " 'relapsed and gone on a 5-day binge.' " Mother told the social worker she had been clean and sober for several days and was enrolled in the Chrysalis Substance Abuse Inpatient Program (Chrysalis). On April 24, 2009, Mother began 90-minute supervised visits with K.B. every other week. During the visits she acted appropriately and would rock, feed and sing to her son, but their contact was not sufficiently frequent or constant so she could develop a maternal relationship with K.B.

The social worker described K.B. as a healthy, happy baby with no diagnosed medical, mental or emotional problems, who was developmentally on target for his age.

The foster mother had recently adopted K.B.'s brother and she wanted to adopt K.B. She was loving and attentive to K.B. and he appeared to be comfortable and happy with her.

At the permanent plan hearing on August 3, 2009, Mother requested a continuance so she could file a section 388 petition based on her efforts to overcome her drug addiction. The court continued the hearing for one day. Mother filed her section 388 petition seeking to set aside the section 366.26 hearing and instead provide her with six months of reunification services. The petition alleged Mother was engaged in the Chrysalis residential treatment program, was undergoing regular drug testing, was benefitting from her participation in the program "[f]or the first time," and "has changed drastically for the better, [has] learned to trust and shares more openly." Mother alleged she had developed a bond with K.B. as a result of consistent visits with him, and that the Agency had denied her request for increased visits and reduced visits from two hours each week to 90 minutes every other week without any explanation. Mother said she was willing to transition into a residential program that would allow K.B. to be placed with her, and that this dependency proceeding was different from her prior cases because she "has demonstrated that she is committed to making a change which ultimately benefits both the mother and child."

Mother attached to her petition two letters from her substance abuse counselor at Chrysalis, dated April 14 and July 13, 2009. The letters stated that Mother was involved in recovery groups and workshops on alcohol and drug addiction, anger management, boundaries, sober living and relapse prevention, and parenting skills. She was also participating in a 12-step program and group therapy. As of July 13, 2009, the counselor reported that Mother "has changed drastically for the better while in our program. She has learned to trust and as a result shares more openly and works more enthusiastically. Her mood is stable and positive. [She] is progressing well, learning about herself and her addiction and is growing emotionally, mentally and spiritually. She is seeking employment, attending all CPS visitations and working the 12-steps."

The court denied the section 388 petition without an evidentiary hearing. It explained: "The Court has reviewed the 388 petition; and based on the record, the Court would deny that petition for the following reason: First, the record before the Court establishes that [K.B.] tested positive for cocaine when he was born. He was released to the foster home where an adopted brother is. There is also a second sibling who is also adopted somewhere else. [¶] Now, under the Section 388 petition, it is the burden of this mother to establish that circumstances have changed that gave cause for terminating reunification. . . . [T]he 388 also requires that it would be in [K.B.]'s best interest to change the Court's order terminating reunification with respect to new evidence that the Court has reviewed as alleged in the 388 petition. [¶] The new evidence is that she, the mother, has entered a drug recovery program recently and that she is progressing, which is wonderful. But she has progressed only recently and has not yet completed the program to indicate safety for [K.B.] Nor is there any adequate showing that restoring reunification services would be in [K.B.]'s best interest based on the form and the record provided to this court. [¶] As to visits with [K.B.], there has only been a maximum of two-hour visits per week, and now it is one and a half a week. That is the burden to establish the granting of 388(a) which has not been established. Accordingly, that petition has to be denied."

After hearing testimony from Mother and the social worker, the court rejected Mother's contentions that the benefit to K.B. of a continuing parental relationship with her outweighed the benefit of a permanent adoptive home. The court found by clear and convincing evidence that K.B. was likely to be adopted and terminated Mother's parental rights. Mother filed this timely appeal.

DISCUSSION

Mother asserts the court violated her statutory and due process rights when it rejected her section 388 petition without a hearing. We conclude there were no such violations.

I. *Section 388*

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] A parent need only make a prima facie showing of these elements to trigger the right to a hearing on a section 388 petition and the petition should be liberally construed in favor of granting a hearing to consider the parent's request. [Citation.] [¶] However, if the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

To get a hearing, the petitioner must show both changed circumstances *and* promotion of the child's best interests. The failure to show either one of these elements defeats the prima facie showing. "[S]ection 388 makes clear that the hearing is only to be held if it appears that the best interests of the child may be promoted by the proposed change of order, which necessarily contemplates that a court need not order a hearing if this element is absent from the showing made by the petition." (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 807.) On appeal, we review the juvenile court's determination for abuse of discretion. (*Id.* at p. 808; *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450.)

II. *Analysis*

Here, Mother did not meet her burden of demonstrating reunification services would promote K.B.'s best interest. When dependency proceedings reach the stage of the

section 366.26 permanency planning hearing, the parent's interest in the care, custody and companionship of the minor is subordinate to the child's needs for permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) A section 388 petition for modification that alleges "merely changing" circumstances and would, if granted, delay the child's placement in a permanent home to see if a parent who has already failed to reunify with older siblings may some day be able to reunify with the child "does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) " ' "[C]hildhood does not wait for the parent to become adequate." ' " (*Ibid.*) "In fact, there is a rebuttable presumption that continued foster care is in the best interest of the child [citation]; such presumption obviously applies with even greater strength when the permanent plan is adoption rather than foster care. A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, what is in the best interest of the child." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 310.)

While Mother's recent efforts to address her long-term substance abuse problems are to be commended, her recent abstinence does not demonstrate the "real reform" (see *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9) that indicates modification would be in K.B.'s best interest. Mother's petition was based on her participation in a six-month drug recovery program, during which she participated in various substance abuse counseling and recovery workshops and demonstrated emotional, mental and spiritual growth. She was undergoing drug testing on a regular basis, seeking employment, and attending Alcoholics Anonymous/Narcotics Anonymous meetings. But these positive accomplishments "do[] not, in and of [themselves], show prima facie that either the requested modification or a hearing would be in the minor's best interests" (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 463), particularly when measured against Mother's long history of drug abuse that resulted in the termination of her parental rights over her two older children. At best, the petition can only allege that Mother is at last

"committed to making a change" and that six months of reunification services would give her "a chance" at reunifying. But the claim that she is "willing to transition into a program that will allow the minor to be placed with her" falls far short of an allegation that, if proven, would demonstrate that she will likely be capable of caring for K.B. after six months of reunification services—or, indeed, within any specified period of time. "Experience has shown that with certain parents, as is the case here, the risk of recidivism is a very real concern. " (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 745.) That concern is all the more real where, as here, the parent seeking reunification abused drugs throughout her most recent pregnancy, went on a "5-day [drug] binge" the month after giving birth, and maintained her sobriety for less than four months and only within the structure of a residential program.

Nor does Mother's claim that she had bonded with K.B. require a hearing on her petition. *In re Angel B., supra,* 97 Cal.App.4th at p. 465, is instructive on this point. Angel was removed from her mother's custody shortly after birth and placed with the prospective adoptive family that was adopting her older sibling. Rejecting Mother's contention that it was in Angel's best interest to offer reunification services, the court wrote: "The parents in this [foster] family clearly, by deed if not by name, were Angel's parents. They, not Mother, provided Angel with all the day-to-day, hour-by-hour care needed by a helpless infant and then growing toddler. Thus, although Mother's petition states that she has bonded with Angel, and that Angel is happy to see her and reaches for her on their visits, such visits, in total, add up to only a tiny fraction of the time Angel has spent with the foster parents. On this record, no reasonable trier of fact could conclude that the bond, if any, Angel feels toward Mother . . . is that of a child for a parent." Sadly, this case is very similar.

Mother also contends the court abused its discretion by delegating its authority to determine the length and frequency of her visits with K.B. to the Agency and later finding that reunification services were not in K.B.'s best interest "because [Mother] has not visited the minor enough." We disagree. To the extent this contention challenges the

April 15, 2009 dispositional order that set the terms for visitation, it was forfeited by Mother's failure to timely appeal from that order. (See, e.g., *Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811; *In re Jesse W.* (2001) 93 Cal.App.4th 349, 354.) To the extent Mother is contending the juvenile court improperly failed to authorize adequate visitation, the contention also fails. "[T]he juvenile court may delegate to the probation officer or social worker the responsibility to manage the details of visitation, including time, place and manner thereof." (*In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1374 ; *In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1009; see *In re Chantal S.* (1996) 13 Cal.4th 196, 213.) Moreover, there is no basis on this record to believe increased visitation would have created a bond between Mother and K.B. so significant as to justify delaying K.B.'s placement in a permanent stable home with the prospective adopted mother who has cared for him since birth. In light of Mother's long history of substance abuse, the recency and relative brevity of her recovery efforts, and her loss of parental rights to her two other children, it is difficult to imagine that increased visitation could have such consequential effect in this case.

Finally, Mother contends the court violated her constitutional due process rights by denying her section 388 petition without a hearing. She argues that her due process interest in a hearing on changed circumstances was particularly strong because: (1) unlike a parent who has been offered reunification services, a section 388 hearing was her only opportunity to show the court she was addressing the issues that led to K.B.'s removal; and (2) because she filed her petition when she was still within the six-month statutory time frame for receiving services, the government's interest in finding a stable long-term placement for K.B. was less compelling than had she filed it after the six-month period.

Her argument is foreclosed by *In re Marilyn H., supra*, 5 Cal.4th at pp. 309-310. There, our Supreme Court held that section 388's requirement of a prima facie case as a predicate to an evidentiary hearing comports with due process. The Court explained: "[T]he Legislature has provided the procedure pursuant to section 388 to accommodate

the possibility that circumstances may change after the reunification period that may justify a change in a prior reunification order. A petition pursuant to section 388 may be used to raise the issue in the trial court prior to the section 366.26 hearing. This procedure provides notice to the parties and an opportunity for hearing if the statutory requirements are met. [Citation.] [¶] Shifting the burden to the parent to file a petition based on a showing of change in circumstance is not unduly burdensome. Such petitions are to be liberally construed in favor of granting a hearing to consider the parent's request. [Citations.] The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*In re Marilyn H., supra,* at p. 310.)

Mother argues we should not follow cases like *In re Marilyn H, supra*, 5 Cal.4th 295, where a section 388 petition was considered in the context of a mother who was provided services and had progress hearings before the court prior to termination of her parental rights. Here, Mother was denied services. She says there should be a different rule in cases like this one because, in the absence of progress hearings, the only way to assess her possible ability to reunify with her child is via a section 388 petition.[2] We disagree. The decision to deny Mother services was made upon evidence showing that she failed to reunify with prior dependent children, and did not address the problems that caused their removal. In the circumstances, we have no difficulty placing the burden upon Mother to make the prima facie showing required by the cases applying section 388. The requirement of a prima facie case applies with equal force where a parent was not offered reunification services because of the prior termination of her parental rights as to her other children.

In sum, while we commend Mother's initial progress to address the problems that led to the removal of her children, the allegations of her section 388 petition were not legally sufficient to require a hearing. The juvenile court did not abuse its discretion or violate Mother's constitutional or statutory rights.

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[2] Mother also argues that *In re Angel B., supra*, 97 Cal.App.4th 454 was wrongly decided, and we should neither follow it nor apply it in this case.

DISPOSITION

The order denying Mother's petition for modification and terminating her parental rights is affirmed.

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Siggins, J.

We concur:

_____
McGuiness, P. J.

_____
Pollak, J.